Sabah Plantation Industry Employees' Union v Sama Subur Sdn Bhd, Tawau & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-49 OF 1991
ABU MANSOR J
11 JANUARY 1993

Administrative Law *— Remedies — Certiorari and mandamus — Application to quash Industrial Court's decision — Findings of Industrial Court contrary to documentary evidence — Court found other reasons for dismissal which was not advanced by employer — Whether court committed jurisdictional error — Whether decision should be quashed and rehearing ordered*

Labour Law *— Industrial Court — Jurisdiction — Findings contrary to documentary evidence and based on reasons not advanced by employer — Whether jurisdictional error*

Labour Law *— Employment — Dismissal — Alleged participation in illegal strike — Whether employee had instigated strike — Whether could be found guilty if co-workers similarly charged were found to be innocent*

This case concerned the dismissal of an employee ('the employee') of Sama Subur Sdn Bhd ('the company'), who was a member of the Sabah Plantation Industry Employees' Union ('the union'). The matter was brought by the union to the Industrial Court ('the second respondent') to determine whether the dismissal was without just excuse. In the company's pleadings, the company alleged that the dismissal was due to the employee's participation in an illegal strike, and that as a result, she was absent from work for three days without obtaining prior permission. The Industrial Court however held that other than participating in the strike as alleged by the company, the employee was also guilty of instigating and inciting the strike, in order to avenge the dismissals of her fellow collegues by the company. The union applied to the High Court for an order of certiorari to quash the decision, and an order of mandamus for rehearing of the case by another Industrial Court panel, on the grounds, inter alia, that: (i) the court had committed a jurisdictional error for finding reasons for the dismissal other than the one which was pleaded by the company; (ii) there was no evidence of the employee's participation in the strike from the documentary exhibits; and (iii) the other collegues of the employee, who were said to have acted in concert with her, were held to be innocent in another division of the Industrial Court, as the company had conceded that their dismissals were without just cause.

Held, allowing the application:

(1) As a general principle, it is the duty of the court to determine whether a dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken, the duty

of the court will be to enquire whether the reason advanced has or has not been made out. The court cannot go into another reason not relied on by the employer or find one for it. A jurisdictional error is committed if the court acts upon an incorrect basis in fact and reaches an absurd result.

(2) In this case, the only reason given by the company in respect of the dismissal of the employee was her participation in the illegal strike. The Industrial Court had committed a jurisdictional error by stating that the employee was guilty of instigating and inciting the strike as well. The court's findings were irrelevant and perverse, as it was in clear disregard of the available evidence. It was also clear that the findings of guilt for the alleged crimes were not on the standard of beyond reasonable doubt, but merely on the balance of probabilities.

(3) There was no evidence to support the Industrial Court's findings that the employee had participated in the illegal strike. The Industrial Court had also failed to take into account the documentary evidence which actually showed that the employee did not participate in the strike.

(4) It was also absurd that the employee should remain guilty of the criminal offences of instigating and incitement, when another division of the Industrial Court had ordered the reinstatement of the employee's colleagues, who were said to have acted in concert with her.

[Bahasa Malaysia summary

Kes ini adalah berkenaan dengan pemecatan seorang pekerja ('pekerja itu') di Sama Subur Sdn Bhd ('syarikat itu'), yang merupakan ahli Sabah Plantation Industry Employees' Union ('kesatuan sekerja itu'). Perkara ini telah dibawa oleh kesatuan sekerja itu ke Mahkamah Perusahaan ('responden kedua') untuk menentukan sama ada pemecatan itu adalah berdasarkan alasan yang adil. Di dalam plidingnya, syarikat itu telah menyatakan bahawa pemecatan itu adalah akibat penyertaan pekerja itu dalam mogok yang menyalahi undang-undang, dan akibatnya, beliau tidak hadir untuk bekerja selama tiga hari tanpa mendapatkan kebenaran terlebih dahulu. Mahkamah Perusahaan telah memutuskan bahawa selain daripada penyertaan dalam mogok seperti yang didakwa oleh syarikat itu, pekerja itu juga bersalah kerana menghasut dan mengapikan mogok itu untuk tujuan membalas dendam terhadap pemecatan rakan-rakan sekerjanya oleh syarikat itu. Kesatuan sekerja itu membuat permohonan di Mahkamah Tinggi untuk perintah certiorari supaya membatalkan keputusan di atas, dan juga perintah mandamus untuk pendengaran semula kes ini oleh panel Mahkamah Perusahaan yang lain, atas alasan, antara lain, bahawa: (i) mahkamah telah melakukan suatu kesalahan bidang kuasanya, kerana ia telah mencari alasan lain untuk pemecatan itu, selain daripada alasan yang dikemukakan oleh

syarikat itu; (ii) tidak ada bukti tentang penyertaan pekerja itu di dalam mogok tersebut daripada ekshibit dokumentar; dan (iii) rakan-rakan sejawat pekerja itu, yang dikatakan telah bertindak bersama-sama dengan pekerja itu telahpun didapati tidak bersalah oleh bahagian Mahkamah Perusahaan yang lain, kerana syarikat itu telah mengakui bahawa pemecatan mereka adalah tanpa alasan yang adil.

Diputuskan, membenarkan permohonan itu:

(1) Sebagai suatu prinsip am, tanggungjawab mahkamah ialah untuk menentukan sama ada pemecatan yang berkenaan adalah berdasarkan sebab atau alasan yang adil atau tidak. Jika seseorang majikan memilih untuk memberikan suatu sebab untuk tindakannya itu, tanggungjawab mahkamah ialah untuk menyiasat sama ada sebab yang diberikan itu boleh diterima atau tidak. Mahkamah tidak boleh menyiasat suatu sebab yang tidak diberikan oleh majikan ataupun mencarikan suatu sebab untuknya. Suatu penyalahgunaan bidang kuasa adalah dilakukan jika mahkamah bertindak berdasarkan fakta yang salah lalu mencapai keputusan yang tidak masuk akal.

(2) Dalam kes ini, satu-satunya sebab yang diberikan oleh syarikat itu berkenaan dengan pemecatan pekerja itu ialah penyertaannya dalam mogok yang menyalahi undang-undang itu. Mahkamah Industri telah menyalahgunakan bidang kuasa dengan menyatakan bahawa pekerja itu juga bersalah kerana menghasut dan mengapi-apikan mogok itu, yang merupakan alasan yang berlainan daripada apa yang dinyatakan oleh syarikat tersebut. Pendapat mahkamah itu tidak relevan dan jelas bertentangan dengan keterangan yang ada. Adalah jelas juga bahawa pendapat mahkamah bahawa pekerja itu telah melakukan kesalahan jenayah di atas bukan berlandaskan standard melebihi keraguan munasabah, tetapi hanya pada imbangan kebarangkalian.

(3) Tidak ada keterangan untuk menyokong keputusan Mahkamah Perusahaan bahawa pekerja itu telah menyertai mogok yang menyalahi undang-undang itu. Mahkamah juga gagal mengambilkira keterangan dokumentar, yang sebenarnya menunjukkan bahawa pekerja itu tidak menyertai mogok itu.

(4) Juga, adalah tidak munasabah jika pekerja itu masih didapati bersalah atas kesalahan jenayah menghasut, sedangkan bahagian lain Mahkamah Perusahaan telahpun memerintahkan pengembalian jawatan rakan sejawat pekerja itu, yang dikatakan telah bertindak bersama-sama dengan pekerja itu.]

[*Editorial Note*: The respondents' appeal to the Federal Court vide Civil Appeal No 02–79–93 was heard on 5 April 1995. The Federal Court (comprising Mohamed Azmi and Mohamed Dzaiddin FCJJ and Shaik Daud JCA) dismissed the appeal with costs.]

A **Notes**

For cases on dismissals, see 8 *Mallal's Digest* (4th Ed) paras 512–523, 629–636; [1989] Mallal's Digest 949; [1991] Mallal's Digest 1272–1274; [1992] Mallal's Digest 1150–1152; [1993] Mallal's Digest 925.

B For cases on the jurisdiction of the Industrial Court, see 8 *Mallal's Digest* (4th Ed) paras 714–730; [1991] Mallal's Digest 1284–1285; [1992] Mallal's Digest 1162–1165; [1993] Mallal's Digest 932–933.

For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed) paras 48–167, 264–268; [1991] Mallal's Digest 19–26, 29; [1992] C Mallal's Digest 13–14; [1993] Mallal's Digest 7–9.

Cases referred to

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (folld)
Malayan Banking Bhd v Association of Bank Officers, Peninsular D *Malaysia & Anor* [1988] 3 MLJ 204 (folld)

Legislation referred to

Industrial Relations Act 1967

E *B Lobo* (*Lobo & Associates*) for the applicant.
N Sivabalah (*Shearn Delamore & Co*) for the respondents.

Cur Adv Vult

F **Abu Mansor J**: In encl 7, the applicant's counsel prays for an order of certiorari to quash award No 52 of 1991 dated 25 February 1991, of the Industrial Court, and also seeks an order of mandamus that case No 2/3–314/1988 be heard by another Industrial Court panel.

The grounds for this application was that the Industrial Court arrived at its decision without taking account of documentary exhibits made G contemporaneously or immediately after the alleged incident. These exhibits are documents emanating from the Ministry of Labour officers, who were senior officers of the respondent. It was also true that the writers of these exhibits were witnesses in the proceedings before the Industrial Court.

This case concerned the dismissal from work of an employee who H was a union member. At p 2 of the award, the Industrial Court found that the claimant, Puan Surah Siger ('the claimant') was employed as a general clerk/typist by Sama Subur Sdn Bhd, Tawau ('the company'), since 1 October 1984. Her last drawn salary was RM590. The claimant was dismissed on 29 October 1986, for her direct and immediate involvement in an illegal strike by the workers of the Bukit Aman and Nirvana divisions I of the company's estate on 8, 9 and 11 September 1986, and being absent from work without prior permission on these days (see letter of termination, exh CO6). The claimant was secretary of the Sabah Plantation Industry Employees' Union at the material time.

Counsel for the applicant submitted that the first irrelevant consideration that the Industrial Court did take into account in its award was that the reason for the strike was underpayment of wages. He cited the case of *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136 where Raja Azlan Shah CJ (as he then was) held in a dismissal case, and I quote:

> ... it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of that court is the reason advanced by it and *that court or the High Court cannot go into another reason not relied on by the employer or find one for it.* (Emphasis added.)

Counsel for applicant strongly submitted that the Industrial Court in making the award ignored this principle.

Then, the applicant's counsel went on to cite *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 at p 206, which asserts the general principle that it is usually proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. This case also states that recently there emerged a judicial power to review decisions upon the ground that they lack a rationally probative basis in fact. There are also some cases which assert that a jurisdictional error is committed if a decision-maker acts upon an incorrect basis in fact.

He submitted that this court can examine the facts to decide if the Industrial Court had arrived at its finding on an incorrect basis of facts, and if so, following the *Malayan Banking* case, its award should be struck down as being perverse, as no reasonable body of persons would have reached such result and so it reached such a result absurdly.

Counsel submitted that the substance of the applicant's complaint is that contrary to the documentary and official reports produced by witnesses of the respondent, and after full opportunity for cross-examination, the Industrial Court then went and found another reason for the dismissal of the claimant, contrary to the principle in *Goon Kwee Phoy v J & P Coats (M) Bhd*'s case. Counsel submitted further that in the Industrial Court's failure to apply *Goon*'s case, and while holding the reason for the dismissal advanced by the employer, has found the claimant guilty of other offences such as conspiracy, incitement and instigating to strike, which are all criminal offences requiring strict proof.

In para 4.7 of P3 of encl 1, the company in their statement of reply says:

> The company found the claimant's explanation unacceptable and, after conducting investigations, was satisfied that the claimant had participated in an illegal strike on 8, 9 and 11 September 1986.

Was there evidence to support the company's finding? The company sent a letter asking for the claimant's explanation why she was absent for three days. Her reply was in SSSB3, in which she said she was absent without leave on those dates, and she apologized for not being able to inform her superior before leaving the office, but her objective in leaving her office was to stop the workers from carrying on the strike rather than to incite.

However, the company, after investigation, was satisfied that the claimant participated in the illegal strike. Despite this, the Industrial Court found that the claimant was involved in the illegal strike at the Bukit Aman and Nirvana divisions, and that the claimant was the inspirator, and she incited and was the instigator the unrest.

Counsel submitted that the Industrial Court committed jurisdictional error, because the employer only stated that the claimant participated in the illegal strike, and not what the Industrial Court had found. In *Goon*'s case, it was held that it was not competent for the Industrial Court to find another reason. Counsel submitted hat the Industrial Court found an excuse for the employer that, at pp 17 and 18, the Industrial Court said the employer was not guilty of victimization of the claimant, and the claimant's dismissal was in fact in good faith, for inciting, fomenting and instigating an illegal strike. The applicant's counsel submitted further that the Industrial Court committed jurisdictional error because what the employer alleged and after due investigation was only participation in the illegal strike.

It was to be noted that in award No 278 of 1988, another division of the Industrial Court adjudicated the cases of Sirman and Mohd Nur, who were earlier dismissed together with the present claimant. There, the employer conceded that their dismissals were without just cause or excuse, because they were victimized for trade union activities in a different division of the estate. They were duly reinstated. These reinstated workers had gone back to work whilst the claimant had been found and remained guilty of instigation which, counsel submitted, have strict criminal implications, as it is an offence under the Industrial Relations Act 1967 itself. This finding of the Industrial Court has to be viewed in the light of what the employer had pleaded in para 4.7, to be only 'participating'. Counsel submitted that it was clear that the Industrial Court's verdict was perverse and also absurd, since two of claimant's co-employees had been freed of any stigma and were reinstated.

At p 15 of the present award, the Industrial Court said:

> It becomes irresistibly clear that the claimant was not acting alone but in concert with Sirman, Jupri and Mohd Nur with the common intention of instigating the strike, and causing industrial unrest.

Since the Industrial Court had freed Sirman and Mohd Nur because the employer had conceded there was victimization on their part, the position is therefore absurd that the claimant should remain guilty of all those crimes of conspiracy, instigating and incitement, when the employer had merely alleged that she was only participating. It was also clear that the findings of guilt for those alleged crimes were not on the standard of proof of beyond reasonable doubt, but on the balance of probabilities.

But what proof is there of even participating in the illegal strike? The Industrial Court failed to take into account the official written documents contemporaneously issued by the respondent to the Pendaftar Kesatuan Sekerja to show to the contrary of what was held by the Industrial Court, and it would show that the claimant did not take part in the illegal strike.

It is clear to the court, in the letter marked as exh U4, the respondent 'telah menjawab surat eks U3' dated 6 November 1986, 'kepada Timbalan Pendaftar Kesatuan', and gave important and vital information as follows:

(a) 220 orang yang terlibat

(b) bentuk tindakan perusahaan

(1) mogok — tidak mahu bekerja selama tiga hari (8, 9 dan 11 September 1986)

(2) seorang kerani pejabat (staff) Cik Siger telah turut tidak bekerja dan menghilangkan diri dalam masa tiga hari tersebut tanpa sebab.

In the documents, in the list of those participating, there was absence of evidence that the claimant participated in the strike.

The fact of the claimant's participation was seen in p 4 of the award, hotly challenged by the applicant. From what was pleaded in para 4.7 of the statement to be only *participating* in the illegal strike, the claimant was alleged to have graduated to instigating the illegal strike. In coming to the conclusion that the claimant was guilty of instigating, the Industrial Court not only failed to take into account the pleadings in para 4.7, but also did not take into account the evidence from the employer in exh U4.

I find merit in the argument of the applicant's counsel following *Goon*'s case, that the Industrial Court could not find another ground for the claimant's dismissal which was different from what the employer had found after due investigation, and had pleaded in para 4.7 of only participating in the illegal strike.

With due respect to the Industrial Court, I find merit in the argument of the applicant's counsel that the Industrial Court had made a perverse finding when it held, at p 13 of the award, that the reason for the strike, which the Industrial Court held the claimant had instigated, was vendetta by the claimant to avenge the dismissals of Sirman bin Said, Mohd Nur and Jupri. This is in clear disregard of the earliest evidence available on this strike, ie the report of the Penolong Pengarah Hal Ehwal Buruh, Tawau to the Pengarah Hal Ehwal Buruh, Kota Kinabalu dated 6 November 1986 (exh CO8), that the reason for the strike was 'tuntutan gaji dan penyelesaian gaji'. If exh CO8 was to be disbelieved and to be disregarded by the Industrial Court, it should have said so, especially when the officer came years later and gave evidence to contradict his earlier report, in which it was in his official capacity to give.

I allow the applicant's application as prayed and make an order in terms.

Order accordingly.

Reported by Isabel Liong